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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

MARC SOBEL)

WT DOCKET NO. 97-56

Applicant for Certain Part 90)
Authorizations in the Los Angeles)
Area and Requestor of Certain)
Finder's Preferences)

MARC SOBEL AND MARC SOBEL)
D/B/A AIR WAVE)
COMMUNICATIONS)

Licensees of Certain Part 90 Stations)
in the Los Angeles Area)

To: Honorable John M. Frysiak
Administrative Law Judge

**JAMES A. KAY, JR.'S REPLY TO
WIRELESS TELECOMMUNICATIONS BUREAU'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Barry A. Friedman
Scott A. Fenske

Thompson Hine & Flory LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: October 21, 1997

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SUMMARY

Contrary to the Wireless Telecommunications Bureau's argument that the effect of the management agreement was to transfer control of Sobel's stations to Kay, both the management agreement and Sobel and Kay's working relationship did not effectuate such a transfer of control. Instead, Kay and Sobel, owners of separate small businesses, executed the management agreement which provided that Sobel would install and maintain the necessary equipment to operate his stations, activate and deactivate customers on his stations, and control the day-to-day operations of his stations, all in compliance with Commission Rules.

The Wireless Telecommunications Bureau also failed to carry its burden of proving that Sobel made certain intentional misrepresentations in two affidavits signed by Sobel and submitted to the Commission in conjunction with a revocation proceeding against James A. Kay, Jr. The purpose of the affidavits was to have Sobel's licenses removed from the Kay revocation proceeding since the Commission incorrectly included Sobel's licenses in the Kay revocation proceeding. Since the Commission ultimately deleted Sobel's licenses from the Kay proceeding, the affidavits do not support the Bureau's contention that Kay intentionally misrepresented certain facts to the Commission. The Bureau also failed to prove that Sobel had a duty, and intentionally failed, to disclose every detail of his business relationship with Kay.

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James A. Kay, Jr. ("Kay"), pursuant to Sections 1.263 and 1.264 of the Commission's Rules and the Presiding Judge's Order, FCC 97M-134, released August 5, 1997, hereby submits his reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law ("Proposed Findings").

INTRODUCTION

In its Proposed Findings, the Bureau divides the issues designated for hearing into two groups: (i) Transfer of Control Issue; and (ii) Misrepresentation/Lack of Candor Issue. Kay replies to each of these issues as follows:

A. TRANSFER OF CONTROL ISSUE

I. KAY AND SOBEL MAINTAINED A BUSINESS RELATIONSHIP WHICH DID NOT VIOLATE COMMISSION RULES

Contrary to the Bureau's argument that the effect of the management agreement was to transfer control of Sobel's stations to Kay (Proposed Findings, Pg. 41), both the management agreement and Sobel and Kay's working relationship did not effectuate such a transfer of control. Instead, Kay and Sobel, owners of separate small businesses, executed the management agreement and conducted business in a way that both complied with Commission Rules and made good business sense for each of them.

In its barest form, the management agreement between Kay and Sobel provides that Kay leases the equipment necessary for Sobel to construct his stations and services the customers on Sobel's stations in exchange for a portion of the revenues from the stations owned by Sobel and subject to the management agreement. Sobel could have obtained a loan to purchase the necessary equipment to construct his stations (Tr. 187), but this alternative did not make economic sense for him, especially given his long-standing relationship with Kay and the fact that Kay had much of the necessary equipment in his shop (Tr. 310 and 353-354). Instead, under his business arrangement with Kay, Sobel installed and maintains the necessary equipment to operate his stations, activates and deactivates customers on his stations, and controls the day-to-day operations of his stations from control points in his home and his car.

In analyzing transfer of control questions, the Commission and the courts consider, among other matters, the six factors enunciated in Intermountain Microwave, 24 RR 983 (1963).

The non-exclusive factors traditionally considered are:

- (1) Does the licensee have unfettered use of his facilities and equipment?
- (2) Who controls daily operations?
- (3) Who determines and carries out policy decision, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment, supervision, and dismissal of personnel?
- (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- (6) Who receives monies and profits from the operation of the facilities?

The Intermountain factors, however, are not the only factors that should be considered in examining transfer of control issues, but are simply the starting place for the analysis.

The Intermountain factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. . . . As such, they generally provide useful guidelines for evaluating real-party-in-interest and transfer of control questions. We stress, however, that there is no exact formula for determining control and that questions of control turn on specific circumstances of the case. . . . Thus, in applying the Intermountain criteria, we examine the totality of the circumstances.

La Star Cellular Telephone Co., 9 FCC Rcd 7108, 7109 (1994), citing Data Transmission Co., 44 FCC 2d 935, 936 (1974).

Given these clear directions from the Commission, the Bureau's attempts to rigidly apply the Intermountain factors throughout its Proposed Findings (See, e.g., Pgs. 41-48 of the Proposed Findings), without considering the unique business arrangement between Kay and Sobel, must be rejected. Instead, the totality of the circumstances must be considered in determining whether Sobel transferred control of his stations to Kay, including Sobel's long-standing relationship with Kay and the economic motivations which lead to the management agreement. When these and other relevant facts are considered, it is clear that Sobel did not transfer control of his stations to Kay.

Notwithstanding the Commission's clear directions, and even assuming, arguendo, that the Presiding Judge only considers the Intermountain factors, Sobel satisfies each of those factors.

(i) Does the licensee have unfettered use of his facilities and equipment?

Contrary to the Bureau's assertions, Sobel has complete access to the all of his stations; Kay, acting as Sobel's manager, pursuant to the management agreement, only handles the ministerial tasks of customer records and billing. Sobel testified extensively as to his frequent visits to install, repair and maintain the repeater equipment (which is leased from Kay), to activate and deactivate customers, and to monitor his stations' performance, as well as other functions necessary to keep his stations in operation and in compliance with the Commission's Rules (Tr. 188-190 and 294). These activities evidence that Sobel is not only entitled to unfettered access, but is regularly visiting his facilities and equipment.

(ii) Who controls daily operations?

As discussed above, Sobel unquestionably controls the daily operations of his stations. Pursuant to his business arrangement with Kay, the only functions Kay performs are to obtain customers for Sobel's stations and to bill and collect from these customers. Even though Kay performs those limited services for Sobel and the customers on Sobel's stations, Sobel testified that they remain under his ultimate control because he has the final say regarding the placement of customers and their billing rates (Tr. 123) and that he has unfettered access to billing records maintained by Kay, pursuant to the management agreement (Tr. 121). In addition, and contrary to the Bureau's assertion that Kay has the exclusive right to determine who

maintains and repairs the equipment (Proposed Findings, Pg. 42), Sobel, pursuant to his agreement with Kay, has always maintained and repaired the equipment at his stations (Tr. 104).

- (iii) Who determines and carries out policy decision, including preparing and filing applications with the Commission?

Unlike most of their large corporate competitors, Sobel is a true "sole proprietor"; Kay has a small number of employees who assist him in his radio service and sale business. Under these circumstances, there are no elaborate meetings concerning Sobel's stations and his business. Instead, Sobel, himself, makes all decisions concerning his business and his stations. Although Sobel occasionally seeks Kay's advice and assistance concerning various matters, including the preparation and filing of applications, Sobel testified that every action taken with regard to his stations, including the preparation and filing of applications, is undertaken under his direct control, supervision and approval (Tr. 222-223). Therefore, contrary to the Bureau's contention, Sobel can not be deemed to have transferred control of his stations to Kay.

- (iv) Who is in charge of employment, supervision, and dismissal of personnel?

Again, Sobel operates and maintains his stations without any employees and this element of the test need not be considered. Even if it is, Kay uses his current employees only to perform his marketing, billing and customer service functions that he is required to perform pursuant to his agreement with Sobel. These employees do not differentiate between the work performed on stations owned by Sobel and those owned by Kay (Tr. 340). The fact that Kay has employees to perform his required duties under the management agreement is irrelevant in determining transfer of control in this case since Kay is admittedly performing these functions pursuant to his agreement with Sobel.

- (v) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
-

The Bureau is grossly in error in alleging that “[t]he most compelling evidence of Kay’s control . . . is his absolute control over the station’s finances.” (Proposed Findings, Pg. 47). As outlined in his management agreement with Kay, Sobel made a business decision to lease the necessary equipment from Kay. But for this arrangement, Sobel would have taken out a loan to purchase such equipment (Tr. 197) and be making equivalent, if not greater, payments to his lender. The arrangement with Kay made financial sense not only for Sobel, but also for Kay, who had much of the inventory that Sobel needed to construct Sobel’s stations in his shop (Tr. 280-282). If Kay and Sobel had not made this type of arrangement, Sobel would still have likely subleased space from Kay, coordinated services with Kay, and purchased and used equipment compatible with Kay’s because of the convenience of servicing and maintaining it. (Tr. 185).

- (vi) Who receives monies and profits from the operation of the facilities?

As consideration for his services under the management agreement, Kay receives the first \$600.00 in revenue from the stations. Contrary to the Bureau’s assertion that Sobel does not receive any monies and profits from the operation of the stations, Sobel, pursuant to his agreement with Kay, receives his standard hourly rate for services performed on the stations (Tr. 144 and 245-6). This arrangement was a central component of the business deal Sobel reached with Kay; an arrangement Kay has never deviated from.

The Bureau has attempted to twist the facts in numerous ways in an effort to carry its burden of proving that Sobel transferred control of his stations to Kay. It has not done so. Instead, the testimony shows that Sobel entered into an agreement with Kay that made economic

sense to Sobel. The fact that the agreement was between two close friends should not detract from the inescapable conclusion that Sobel remains an active owner. Sobel had full access to his stations, controlled their daily operations, maintained full authority for all major decisions affecting his stations, and profited from his stations' day-to-day operations. The Bureau's proposed factual findings to the contrary should be wholly disregarded.

B. MISREPRESENTATION/LACK OF CANDOR ISSUE

I. THE BUREAU'S PROPOSED FINDINGS EXCEED THE SCOPE OF THE HEARING DESIGNATION ORDER

As noted by the Bureau in the Proposed Findings (Pg. 4), on May 8, 1997, the Presiding Judge, at the Bureau's specific request, added the following issues to the hearing designation order:

- (a) To determine whether Marc Sobel misrepresented material facts or lacked candor *in his affidavit of January 24, 1995* (emphasis added).
- (b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

Despite the limited scope of the added issue, in its Proposed Findings regarding the "Misrepresentation/Lack of Candor Issue", the Bureau seeks to improperly expand on the issues designated for hearing by unilaterally adding three (3) other instances of alleged misrepresentation in addition to the "January 1995 Affidavits": namely (i) Responses to Application Return Notices (Proposed Findings, Pg. 28); (ii) the Management Agreement (Proposed Findings, Pg. 29); and (iii) the Stanford Letter (Proposed Findings, Pg. 30). See, e.g., The Telephone Co., Inc., et. al., 41 RR2d 611, 616-617 (1977) (certain findings and conclusions set aside since they were "beyond the scope of the issues in this proceeding."). Since these issues

are clearly beyond the scope of the issues designated by the Commission, any arguments or proposed findings of fact submitted by the Bureau, other than those surrounding the "January 1995 Affidavits" should be wholly disregarded.¹

II. THE BUREAU HAS TAKEN THE JANUARY 1995 AFFIDAVITS OUT OF CONTEXT IN WHICH THEY WERE SUBMITTED

As part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed by Kay on or about January 12, 1995, in WT Docket No. 94-147, Sobel submitted an affidavit (Bureau Ex. 41) wherein he stated, inter alia, that he is "an individual, entirely separate and apart in existence and identity from James A. Kay."² The purpose of the January 1995 Affidavits was to have Sobel's licenses removed from the Kay revocation proceeding since the Commission incorrectly included Sobel's licenses in the Kay revocation proceeding. (Tr. 142-43).

In January 1995, the Commission's revocation proceeding against Kay had just begun. The affidavits were submitted by Sobel as additional evidence that Kay's licenses and Sobel's licenses were owned by different persons and that Sobel's licenses could not be included among those the Commission sought to revoke in a proceeding against Kay. The Commission subsequently agreed with Kay and voluntarily deleted Sobel's licenses from Kay's revocation hearing. See Order, released May 8, 1996 ("[T]he Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 10 FCC Rcd 2062 (1994) IS

¹ Among the conclusions of law proposed by the Bureau that should be disregarded on the basis that they exceed the scope of the issues designated for hearing is the conclusion that "Kay had taken affirmative steps to conceal the fact that Kay was billing clients of Sobel's stations." (Proposed Findings, Pg. 52). No record evidence supports such a conclusion.

² Sobel subsequently executed the same affidavit on January 24, 1995 (Bureau Ex. 43) in conjunction with a pleading refiled by Kay's former counsel in WT Docket No. 94-147 entitled "Motion to Enlarge, Change, or Delete Issues."

MODIFIED to delete from [the Kay proceeding] the facilities licensed to Multiple M Enterprises, Inc. and Marc Sobel . . ."). While the purpose of the Sobel Affidavits was to confirm that Sobel's licenses should not have been included in the Kay revocation proceeding and the Bureau and the Commission ultimately agreed with this contention, the statements contained in the Sobel Affidavits are clearly not evidence that Sobel misrepresented certain facts to the Commission.

Despite these facts, the Bureau claims that Sobel misled it by certain representations made in the Sobel Affidavits. The context in which the Bureau's claims were made is again relevant. The Bureau made the claim that the Sobel Affidavits were misleading over two years after the affidavits were submitted,³ in an effort to strengthen its case against Sobel. Contrary to the Bureau's argument, Sobel had no reason, nor was he required, to provide the Commission with a detailed description of his relationship with Kay with respect to the stations that are subject to the management agreement. As the party with the burden of proof, the Bureau has failed to prove that Sobel had a duty, and intentionally failed, to disclose every detail of his business arrangement with Kay.

III. THERE WERE NO AGGRAVATING CIRCUMSTANCES SUPPORTING THE CONCLUSION THAT SOBEL IS NOT FIT TO BE A COMMISSION LICENSEE

The Bureau argues that because of the alleged unauthorized transfer of control, Sobel is not qualified to be a Commission licensee and states that there are aggravating circumstances with support that conclusion. According to the Bureau, one such aggravating circumstance is that "Sobel transferred control to an individual [Kay] whose qualifications to be

³ The misrepresentation/lack of candor issue was added almost two months after the original hearing designation order was released.

a Commission licensee are in doubt.” (Proposed Findings, Pg. 58). This alleged aggravating circumstance is baseless. The Bureau designated Kay’s status for a revocation hearing in December, 1994. However, the proceeding has not yet been tried, let alone decided. It is, therefore, a tremendous leap of faith for the Bureau to allege that Kay’s qualification to be a Commission licensee is in doubt when the Presiding Judge in the Kay case told Bureau counsel that he was “disturbed” to learn that “[w]e’re having a hearing designation [against Kay] and now what you’re telling me is you’re seeking to depose in order to find out who might have information [to support the allegations against Kay contained in the hearing designation order] . . . [T]his information somehow or other should have been obtained before a hearing designation order was issued.” See Transcript of Prehearing Conference in WT Docket No. 94-147, March 19, 1997, Pg. 214.

Contrary to the Bureau’s argument (Proposed Findings, Pg. 59), the record is devoid of any evidence that Sobel willfully or intentionally misrepresented any fact to the Commission or otherwise willfully or intentionally violated any Commission Rule. See, Fox River Broadcasting, 93 FCC2d 127 (1983). Sobel executed the management agreement prepared by his attorneys after being told that it complied with Commission Rules (Tr. 263). Furthermore, as discussed above, the January Affidavits were prepared by counsel for both Kay and Sobel for the sole purpose of advising the Commission that they were two separate licensees and that Sobel’s licenses could not be legally revoked in Kay’s revocation proceeding (Tr. 154-55), a position that both the Bureau and the Commission ultimately agreed with.

CONCLUSION

After full consideration of the trial testimony and the proposed findings of fact and conclusions of law presented by both the Bureau and Sobel, it is clear the Bureau has not carried its burden of proof on both the transfer of control and the misrepresentation issues. Therefore, the issues designated for hearing by the Commission should be resolved in favor of Marc D. Sobel d/b/a Air Wave Communications.

Respectfully submitted,

JAMES A. KAY, JR.

By: 

Barry A. Friedman

Scott A. Fenske

Thompson Hine & Flory LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: October 21, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing James A. Kay, Jr.'s Reply to Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law was hand-delivered on this 21st day of October, 1997 to the following:

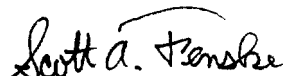
Administrative Law Judge John M. Frysiak
Federal Communications Commission
2000 L Street, N.W.
Second Floor
Washington, D.C. 20554

Gary P. Schonman, Esquire
Federal Communications Commission
Wireless Telecommunications Bureau
Enforcement Division
Suite 8308
2025 M Street, N.W.
Washington, D.C. 20554

and sent via first-class mail, postage prepaid on this 21st day of October, 1997 to:

William H. Knowles-Kellett, Esquire
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245.

Robert J. Keller, Esquire
4200 Wisconsin Avenue, N.W.
Suite 106-233
Washington, D.C. 20016-2143



Scott A. Fenske